Medley Farm
D-11

FILED

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JOHN W. WILLIAMS, CLERK
U. S. DISTRICT COURT

UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH CAROLINA
SPARTANBURG DIVISION

ENTERED
7-8-86

UNITED STATES OF AMERICA,

Plaintiff,

vs.

RALPH C. MEDLEY, CLYDE MEDLEY, GRACE MEDLEY AND BARRY MEDLEY, INDIVIDUALLY AND d/b/a MEDLEY'S CONCRETE WORKS: MILLIKEN & COMPANY: UNISPHERE CHEMICAL CORPORATION: NATIONAL STARCH AND CHEMICAL CORPORATION,

Defendants.

CIVIL ACTION FILE NO. 7:86-252-3

ORDER GRANTING PLAINTIFF'S MOTION TO STRIKE THE SECOND DEFENSE ASSERTED BY DEFENDANT NATIONAL STARCH AND CHEMICAL CORPORATION

INTRODUCTION

This matter has come before the court on the motion of Plaintiff, United States of America, pursuant to Rule 12(f) of the Federal Rules of Civil Procedure, to strike the second defense asserted by defendant National Starch and Chemical Corporation in its Answer to the Complaint filed herein. As grounds for said motion, Plaintiff asserted that this affirmative defense is insufficient and does not as a matter of law provide a defense to liability under the Comprehensive Environmental Response, Compensation and Liability Act ("CERCLA"), 42 U.S.C. § 9601, et seq. Defendant National Starch and Chemical Corporation ("National Starch") opposed the motion and argued that the defense is sufficient as a matter of law and raises significant factual and legal issues which should not be resolved in a motion to strike.

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BACKGROUND

This action was instituted by plaintiff United States pursuant to Sections 104 and 107 of CERCLA, 42 U.S.C. § 9601 and 9607, for recovery of costs incurred and to be incurred by the United States in response to the release or threatened release of hazardous substances from a waste disposal facility in Cherokee County, South Carolina known as the Medley Farm site. The action also seeks declaratory relief, pursuant to 28 U.S.C. § 2201, entitling the United States to recover all future response costs incurred in connection with the site.

In its answer to the United States' complaint National Starch presented the following defense:

SECOND DEFENSE

> The United States alleges drums containing Charles S. Tanner's name were found at the Medley Farm site. The United States failed to provide National Starch or Charles S. Tanner Company [a subsidiary of National Starch] with a reasonable opportunity to undertake response action at the Medley Farm site as required by Section 104 of CERCLA. Accordingly, no action may be maintained against National Starch seeking reimbursement for costs incurred in the United States' immediate removal action.

Defendant National Starch relies upon Section 104(a)(1) of CERCLA, 42 U.S.C. § 9604(a)(1), which provides in pertinent part:

> Whenever any hazardous substance is released or there is a substantial threat of such a release into the environment . . . the President is authorized to act, consistent with the

> National Contingency Plan, to remove or arrange for the removal of . . . such hazardous substance . . . unless the President determines that such removal and remedial action will be done properly by the owner or operator of the vessel or facility from which the release or threat of release eliminates, or by any other responsible party.

42 U.S.C. § 9604(a) (emphasis added).

Plaintiff contends that the only defenses to liability under CERCLA are those enumerated in Section 107(b) of CERCLA, 42 U.S.C. § 9607(b). Section 107(b) provides that there shall be no liability under Section 107(a) for a person otherwise liable who can establish by a preponderance of the evidence that the release or threat of a release of a hazardous substance was caused solely by an unrelated party or event. The United States further argued that it satisfied all conditions precedent to undertaking response actions at the Medley Farm site and for recovery of costs incurred as a result of such actions.

PROCEDURAL RULE INVOLVED

Rule 12(f) of the Federal Rules of Civil Procedure provides, in pertinent part, that:

> the court may order stricken from any pleading any insufficient defense or any redundant, immaterial, impertinent or scandalous matter.

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CONCLUSION

Under the express terms of Section 107(a) of CERCLA, liability under CERCLA is subject only to those defenses enumerated in Section 107(b) of CERCLA. Because defendant National Starch's second defense is not a Section 107(b) defense, it is insufficient as a matter of law. Moreover, there is nothing in the plain language of Section 104 of CERCLA which imposes an affirmative duty upon the government to consult with private parties before undertaking response actions. Reasonably construed, the passive language of Section 104(a) merely encourages, rather than compels, responsible party participation in cleanups. Consequently, notification of responsible parties is not a condition precedent to government initiated response actions under CERCLA. WHEREFORE, IT IS HEREBY ORDERED that plaintiff's motion to strike defendant National Starch's second defense should BE, and IS hereby GRANTED.

DATED this 6 day of July, 1986.

G. ROSS ANDERSON, JR.
United States District Judge

A TRUE COPY
Attest: John W. Williams, Clerk
By: Carolyn Moss
Deputy Clerk

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